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Directive 2008/101 and Air Transport - A Regulatory Scheme beyond the Limits of the Effects Doctrine

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DIRECTIVE 2008/101 AND *AIR TRANSPORT*—A REGULATORY SCHEME BEYOND THE LIMITS OF THE EFFECTS DOCTRINE

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I. INTRODUCTION

ON DECEMBER 21, 2011, the Court of Justice of the European Union handed down its judgment in the case of *Air Transport Ass'n of America v. Secretary of State for Energy and Climate Change (Air Transport)*.¹ The Court's far-reaching and controversial decision validated the European Union's (EU) carbon emissions trading scheme (the scheme) as applied to international aviation.² This decision has not been without widespread, outspoken criticism, especially from non-EU countries.³ This article explores the Court's decision in this landmark case, analyzes the decision in light of relevant international law, and concludes that the Court's judgment was excessive and should have been more narrowly tailored to conform to jurisdictional customary international law—namely, the “effects doctrine.”

Part II summarizes and gives context to the relevant international treaties that laid out part of the framework for the Court's decision and the applicable EU directives that established the scheme. Part III comprehensively analyzes and explains the *Air Transport* case in its entirety. Part IV briefly observes international opposition to the Court's decision and the EU's subsequent suspension of the scheme. Part V looks to applicable customary international law regarding jurisdiction that is relevant to the *Air Transport* case, and whether the scheme, as interpreted in *Air Transport*, satisfies the effects doctrine as a basis for jurisdiction. Finally, Part VI offers a brief conclusion. Although the Court gave considerable attention to the effect of international treaties on the directives, this article focuses the majority of its analysis on the relevant aspects of jurisdictional customary international law.

II. THE SCHEME'S FRAMEWORK—INTERNATIONAL TREATIES AND EU DIRECTIVES

A. INTERNATIONAL TREATIES

Over the past sixty years, the Member States of the EU and the EU itself (formerly known as the European Community) have entered into various international treaties that influence

¹ Case C-366/10, *Air Transp. Ass'n of Am. v. Sec'y of State for Energy & Climate Change*, 2 C.M.L.R. 4 (2012).

² *Id.* ¶¶ 155–157.

³ See, e.g., Valerie Volcovici, *Senate Votes to Shield U.S. Airlines from EU's Carbon Scheme*, REUTERS (Sept. 22, 2012), <http://www.reuters.com/article/2012/09/22/us-usa-carbon-airlines-idUSBRE88L06C20120922>.

the EU's ability to regulate international aviation and its ability—even its obligation—to regulate the emission of greenhouse gases. A few of these treaties include the Chicago Convention, the Kyoto Protocol, and the Open Skies Agreement.

The Chicago Convention was signed on December 7, 1944, and established the International Civil Aviation Organization (ICAO), among other things.⁴ The Convention has been ratified by each EU Member State, but not by the EU itself.⁵ Generally speaking, the Chicago Convention worked to effectuate international cooperation with respect to international aviation, liberalized the international aviation market, and established a uniform framework for the regulation of international aviation.⁶ The Chicago Convention is considered the “backbone of international air law.”⁷

On May 9, 1992, the United Nations Framework Convention on Climate Change (Framework Convention) was adopted with “the ultimate objective of achieving stabilisation of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.”⁸ Pursuant to the Framework Convention, the Kyoto Protocol was adopted on December 11, 1997.⁹ “The purpose of the Kyoto Protocol is to reduce, during the period 2008 to 2012, overall emissions of six greenhouse gases . . . to at least 5% below 1990 levels”; EU Member States committed to reducing their greenhouse gas emissions “to 8% below their 1990 levels.”¹⁰ The EU itself is a party to both the Framework Convention and the Kyoto Protocol.¹¹ Notably, Article 17 of the Kyoto Protocol specifically endorses the implementation of a carbon emissions trading scheme.¹²

⁴ See Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295 [hereinafter Chicago Convention].

⁵ *Air Transp. Ass'n of Am.*, 2 C.M.L.R. 4, ¶ 3.

⁶ See Chicago Convention, *supra* note 4.

⁷ Benoit Mayer, *Case C-366/10*, Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change, *Judgment of the Court of Justice (Grand Chamber) of 21 December 2011*, 49 COMMON MKT. L. REV. 1113, 1127 (2012).

⁸ *Air Transp. Ass'n of Am.*, 2 C.L.M.R. 4, ¶ 10.

⁹ *Id.*

¹⁰ *Id.* ¶ 11.

¹¹ *Id.* ¶ 10.

¹² Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22 (1998) [hereinafter Kyoto Protocol].

Finally, in April 2007, the United States and the EU entered into an agreement regarding international air transportation that was “designed in particular to facilitate the expansion of international air transport opportunities by opening access to markets and maximising benefits for consumers, airlines, labour, and communities on both sides of the Atlantic.”¹³ This agreement—the Open Skies Agreement—was amended in June 2010.¹⁴ The relevant provisions of the Open Skies Agreement will be discussed in detail in Part III.

B. RELEVANT EU DIRECTIVES

The EU’s emissions trading scheme began with Directive 2003/87 and took effect on January 1, 2005.¹⁵ This initial emissions trading scheme only applied to a limited number of activities—it did not apply to aviation activities.¹⁶ The EU subsequently enacted Directive 2008/101 to amend Directive 2003/87 and include aviation activities in the scheme.¹⁷ Directive 2008/101 took effect on January 1, 2012: “From 1 January 2012 all flights which arrive at or depart from an aerodrome situated in the territory of a Member State to which the Treaty applies shall be included.”¹⁸ In other words, all flights—whether operated by EU or non-EU airlines—that take off from or land at an airport within the EU must participate in the scheme.¹⁹ This is where things start to get controversial.

What exacerbates the international aviation industry’s and non-EU countries’ disdain for this unilateral scheme is the formula used to calculate the amount of carbon emissions for which each airline is liable. Emissions are calculated from take-off until landing, regardless of how much flight time was spent over EU territory; the entire flight’s emissions are counted as long as the flight either took off from or landed in EU territory.²⁰ For example, a U.S. airline conducting a round-trip flight from New York to London to New York will be liable for its emis-

¹³ *Air Transp. Ass’n of Am.*, 2 C.L.M.R. 4, ¶ 13.

¹⁴ *Id.* ¶ AG16.

¹⁵ Mayer, *supra* note 7, at 1115.

¹⁶ *Id.* at 1115–16.

¹⁷ *Air Transp. Ass’n of Am.*, 2 C.L.M.R. 4, ¶ 32.

¹⁸ *Id.* ¶¶ 33–34.

¹⁹ *See id.*

²⁰ *See id.* ¶ 40. The specific emissions quantity for which an airline is liable is calculated by the following formula: “fuel consumption x emission factor.” The value of the “fuel consumption” variable is calculated by the following formula: “amount of fuel contained in aircraft tanks once fuel uplift for the flight is com-

sions throughout the entire flight, including its emissions in U.S. airspace.²¹

III. *AIR TRANSPORT*—ANALYSIS OF THE COURT OF JUSTICE'S OPINION

The principal case, *Air Transport*, was brought by the Air Transport Association of America and various American airline companies (collectively, the ATA) against the United Kingdom's Secretary of State for Energy and Climate Change (the U.K. is the administering Member State).²² The ATA brought the case in the High Court of Justice of England and Wales, Queen's Bench Division, which stayed the proceedings and referred several questions to the Court of Justice for a preliminary ruling.²³

Ultimately, the Court had to address two questions: (1) which, if any, of the possible sources of international law "are capable of being relied upon . . . for the purpose of assessing the validity of Directive 2008/101"; and (2) if any of the sources may be relied upon, whether the Directive was valid in light of such sources of international law.²⁴ The sources of international law referred to by the U.K. court and the objects of these two questions were the Chicago Convention, the Kyoto Protocol, the Open Skies Agreement, and four "principles" of customary international law.²⁵ The four principles included: (1) the "principle that each State has complete and exclusive sovereignty over its airspace"; (2) the "principle that no State may validly purport to subject any part of the high seas to its sovereignty"; (3) the "principle of freedom to fly over the high seas"; and (4) the "principle that aircraft overflying the high seas are subject to the exclusive jurisdiction of the State in which they are registered."²⁶ The existence of the first three principles was uncontested, but the existence of the fourth as a valid principle of customary international law was disputed.²⁷

plete – amount of fuel contained in aircraft tanks once fuel uplift for subsequent flight is complete + fuel uplift for that subsequent flight." *Id.*

²¹ See generally *id.*

²² *Id.* ¶¶ 42–43.

²³ *Id.* ¶ 45.

²⁴ *Id.* ¶¶ 45–46.

²⁵ *Id.* ¶ 45.

²⁶ *Id.* ¶¶ 103–106.

²⁷ *Id.* ¶¶ 105–106.

A. WHICH SOURCES OF INTERNATIONAL LAW MAY BE USED TO ASSESS THE VALIDITY OF THE DIRECTIVE?

The Court of Justice began its analysis by noting, “[W]here international agreements are concluded by the European Union[,] they are binding upon its institutions and, consequently, they prevail over acts of the European Union.”²⁸ Because only the EU Member States themselves—and not the EU as a whole—are parties to the Chicago Convention, the Court held that the EU is not bound by the Convention and it therefore cannot affect the validity of Directive 2008/101.²⁹ Likewise, while the EU is a party to the Kyoto Protocol, the Court found that the relevant provisions of the Protocol relating to the scheme are not “unconditional and sufficiently precise” to be relied upon to assess the validity of Directive 2008/101.³⁰ On the other hand, the Court did find that certain provisions of the Open Skies Agreement are unconditional and sufficiently precise.³¹ Therefore, the Court held that the Open Skies Agreement was the only international treaty that could be used to assess the validity of Directive 2008/101 in this case.³²

The Court of Justice next determined which of the alleged “principles” of customary international law were recognized principles and whether the recognized principles could be used to assess the validity of Directive 2008/101.³³ The Court confirmed the recognition of the first three uncontested principles of customary international law referred to by the U.K. court, but held that there was insufficient evidence to recognize the fourth alleged principle as a principle of customary international law.³⁴

The Court then determined whether principles of customary international law can be relied upon to assess the validity of an EU directive.³⁵ In finding that they can be, the Court referred to the Treaty on European Union and stated, “[T]he European Union is to contribute to the strict observance and the development of international law. Consequently, when it adopts an act, it is bound to observe international law in its entirety, including customary international law, which is binding upon the institu-

²⁸ *Id.* ¶ 50.

²⁹ *Id.* ¶¶ 69–70.

³⁰ *Id.* ¶¶ 77–78.

³¹ *Id.* ¶¶ 87, 94, 100.

³² *Id.* ¶ 111.

³³ *Id.* ¶ 102.

³⁴ *Id.* ¶¶ 105–106.

³⁵ *Id.* ¶¶ 107–111.

tions of the European Union.”³⁶ Therefore, a relevant principle of customary international law is capable of affecting the ability of the EU to adopt a particular directive.³⁷ However, because a principle of customary international law lacks the precision that is typically found in an international agreement, the Court determined that “judicial review must necessarily be limited to the question whether, in adopting the act in question, the institutions of the European Union made manifest errors of assessment concerning the conditions for applying those principles.”³⁸ In other words, the Court established that while principles of customary international law may be used to review the validity of an EU directive, such review is done under a highly deferential standard of review: “manifest error.”³⁹

Therefore, the Court’s answer to question one (which of the referred sources of international law may be relied upon to address the validity of EU Directive 2008/101) is that the following sources may be relied upon: (1) the Open Skies Agreement; (2) the principle that each state has complete and exclusive sovereignty over its airspace; (3) the principle that no state may validly purport to subject any part of the high seas to its sovereignty; and (4) the principle of freedom to fly over the high seas.⁴⁰ When reliance is placed on the three principles of customary international law, review is limited to the standard of manifest error.⁴¹ It is with this determination that the Court turned to the second question: whether Directive 2008/101 is valid in light of these applicable sources of international law.

B. IS DIRECTIVE 2008/101 VALID IN LIGHT OF BINDING, APPLICABLE INTERNATIONAL LAW?

The Court ultimately determined that Directive 2008/101 was valid because none of the four binding, applicable international laws relied upon acted so as to cast doubt on the validity of Directive 2008/101 and “disclosed no factor of such kind as to affect its validity.”⁴² The Court analyzed the Open Skies Agreement separately from the three principles of customary international law.

³⁶ *Id.* ¶ 101.

³⁷ *Id.* ¶ 107.

³⁸ *Id.* ¶ 110.

³⁹ *Id.*

⁴⁰ *Id.* ¶ 111.

⁴¹ *Id.* ¶ 110.

⁴² *Id.* ¶ 157.

In determining that Directive 2008/101 does not violate the Open Skies Agreement, the Court implicitly emphasized the great importance of “improving environmental protection.”⁴³ The Court found that the Open Skies Agreement allows “unilateral non-discriminatory measures in the absence of ICAO standards.”⁴⁴ And while the Open Skies Agreement prohibits a direct charge on fuel consumption, such as “a tax levied on fuel consumption itself,” the Agreement does not prohibit “market-based measure[s],” such as the scheme established in the Directive.⁴⁵ The Court also focused on the Open Skies Agreement’s requirement of reciprocity when establishing regulations related to environmental protection.⁴⁶ The scheme is non-discriminatory in that it applies evenly to EU and non-EU airlines alike, and therefore the Court found that the scheme lives up to the requirement of reciprocity.⁴⁷

One of the main issues raised by the ATA in *Air Transport*—an issue that is the focus of the analysis in Part V—is that the EU is regulating and subjecting non-EU airlines to its laws under the scheme for aviation activities occurring beyond the jurisdiction of the EU.⁴⁸ The Open Skies Agreement-specific argument is that this violates Article 7, which “requires aircraft engaged in international navigation to comply with the laws and regulations of the European Union *only* when the aircraft enter or depart from the territory of the Member States or . . . when their aircraft are within that territory.”⁴⁹ The Court dismissed this argument by reasoning that “it need only be recalled” that the scheme does not apply to non-EU aircraft that are solely flying over the high seas or non-EU Member States, but rather only applies to non-EU airlines that “choose to operate commercial air routes” taking off from or landing in the EU; furthermore, Article 7 makes it clear that aircraft seeking admission into or departure from EU territory are engaged in international aviation and are “required to comply with” legislation of that territory, and thus such airlines are not precluded under Article 7.⁵⁰

⁴³ See *id.* ¶¶ 138–140, 150.

⁴⁴ Mayer, *supra* note 7, at 1122.

⁴⁵ *Air Transp. Ass’n of Am.*, 2 C.L.M.R. 4, ¶¶ 142, 144, 145, 147.

⁴⁶ *Id.* ¶¶ 93–94, 137.

⁴⁷ *Id.* ¶¶ 154–156.

⁴⁸ See *id.* ¶ 131.

⁴⁹ *Id.* (emphasis added).

⁵⁰ *Id.* ¶¶ 131–135.

In determining that Directive 2008/101 does not violate any of the three binding, applicable principles of customary international law, the Court reasoned through the jurisdictional reach of the scheme. In explaining the permissible “territorial scope” of EU legislation, the Court stated that the EU “must respect international law in the exercise of its powers.”⁵¹ However, when an aircraft is within EU territory—meaning physically within the territory, such as when an aircraft lands at an airport—it “is subject to the unlimited jurisdiction” of the EU.⁵² Accordingly, the Court rationalized that because non-EU aircraft flying over but not landing in the EU are not subject to the scheme, and because planes that are subject to the scheme have actually landed in the EU, the scheme does not infringe upon the territoriality or sovereignty of third countries; such planes are subject to the unlimited jurisdiction of the EU when located at EU airports.⁵³ According to the Court, this satisfies the principle of freedom to fly over the high seas because an aircraft is free to fly over the high seas (and even the EU) without being subject to the scheme; subjection to the scheme is solely dependent upon actually landing in the EU.⁵⁴ And once again, the Court emphasized that such aircraft have “chosen to operate a commercial air route” taking off from or landing in the EU.⁵⁵

Such an explanation fails to justify the scheme subjecting non-EU aircraft to liability for emissions that actually occurred outside the jurisdiction of the EU, such as emissions occurring over the high seas or over the airspace of a third country. The Court seemed to realize this and attempted to justify this aspect of the scheme by stressing the importance of environmental policy to the EU, emphasizing the “high level of protection” the EU seeks to provide for the environment, and referring to the EU’s desire to fulfill the objectives of the Kyoto Protocol.⁵⁶ Stretching its justification for the extraterritorial effects of the scheme even further, the Court implicitly invoked the “effects doctrine” and seemed to suggest that emissions occurring outside EU territory still have an indirect but sufficiently causally linked (territorially

⁵¹ *Id.* ¶¶ 121, 123.

⁵² *Id.* ¶ 124.

⁵³ *Id.* ¶ 125.

⁵⁴ *Id.* ¶ 126.

⁵⁵ *Id.* ¶ 127.

⁵⁶ *Id.* ¶ 128.

linked) effect on the EU's environment by detrimentally affecting climate change worldwide.⁵⁷

Accordingly, the Court's ultimate judgment left the scheme wholly intact and unblemished by the Open Skies Agreement and principles of customary international law. Perhaps most controversially, the Court did not feel that imposing liability on non-EU aircraft for emissions occurring outside the EU is an impermissible extraterritorial overreach of EU jurisdiction.⁵⁸

IV. INTERNATIONAL OPPOSITION AND THE EU'S SUSPENSION OF THE SCHEME

The scheme has been labeled "[o]ne of the world's most contentious regulations."⁵⁹ Opposition to this ruling and the EU's passage of Directive 2008/101 emerged when Directive 2008/101 was still a mere idea, and the United States seems to have maintained its position at the forefront of the opposition.⁶⁰ In 2007, before Directive 2008/101 was passed, the United States led a diplomatic coalition of high-level diplomats from countries such as China and Canada against the inclusion of non-EU aircraft in the proposed Directive.⁶¹ The coalition considered the inclusion of non-EU aircraft to be an inappropriate "'unilateral proposal.'"⁶² Furthermore, after the passage of Directive 2008/101 and during the Court of Justice's deliberation of *Air Transport*,

the diplomacies of 28 countries, including Brazil, South Africa, India and China, denounced what they called EU's "unilateralism," and they led the Council of the International Civil Aviation Organization (ICAO) to declare its opposition to the EU plan. Threats of retaliation were put forward by Chinese and American Lobbyists. Five days before the release of the Court's judgment, a letter by US Secretary of State Clinton . . . reaffirmed that the United States would be "compelled to take appropriate action" if the EU followed its plans.⁶³

⁵⁷ See *id.* ¶ 129.

⁵⁸ *Id.* ¶ 157.

⁵⁹ Wolfgang H. Thome, *African Airlines Exhale After EU Suspends ETS*, E TURBO NEWS (Nov. 12, 2012), <http://www.eturbonews.com/32227/african-airlines-exhale-after-eu-suspends-ets>.

⁶⁰ Mayer, *supra* note 7, at 1113.

⁶¹ *Id.*

⁶² *Id.* at 1113–14.

⁶³ *Id.* at 1114 (internal citations omitted). Japan has also declared its opposition to the scheme and the *Air Transport* decision. Charles Alcock & Paul Lowe, *Europe Backs Down with International ETS Suspension*, AINONLINE (Dec. 3, 2012,

These threats of retaliation and opposition were not purely empty threats. In response to *Air Transport*, the U.S. House of Representatives passed the European Union Trading Scheme Prohibition Act,⁶⁴ a strongly bipartisan bill that the U.S. Senate had already *unanimously* passed and that shielded U.S. airlines from paying for their carbon emissions.⁶⁵ The bill went into effect on November 27, 2012, with President Obama's signature.⁶⁶ Interestingly, the sponsors of the two U.S. bills condemned the scheme as a "tax," an "illegal tax," and "a European tax when flying in U.S. airspace."⁶⁷ However, the EU adamantly denies that the scheme is a tax.⁶⁸ The bills passed by the U.S. Congress give "the U.S. transportation secretary authority to stop U.S. airlines from complying with the EU law."⁶⁹ In addition to the American responses to *Air Transport*, "the four main Chinese airlines announced that they would not pay any carbon charge; Russia threatened to retaliate in restricting trans-Siberian flights for European airlines; and the African Airline Association expressed its hostility to the scheme."⁷⁰ China even made threats to impound European aircraft if the EU attempted to punish Chinese airlines for not complying with the scheme.⁷¹ However, almost all airlines have "reluctantly" complied with the scheme.⁷² But "Chinese and Indian carriers missed an interim deadline to submit information required under [the scheme]."⁷³

The international outrage surrounding the scheme and *Air Transport* only gained steam over time and came to the brink of an "immediate threat of a trade war with major powers such as the U.S., China, Russia, India and Japan."⁷⁴ In light of this international backlash, the EU's climate change commissioner an-

3:10 AM), <http://www.ainonline.com/aviation-news/aviation-international-news/2012-12-03/europe-backs-down-international-ets-suspension>.

⁶⁴ European Union Trading Scheme Prohibition Act of 2011, Pub. L. No. 112-200, 126 Stat. 1477 (2012).

⁶⁵ Alcock & Lowe, *supra* note 63; Volcovici, *supra* note 3.

⁶⁶ See European Union Trading Scheme Prohibition Act of 2011.

⁶⁷ Volcovici, *supra* note 3.

⁶⁸ Neha Sethi, *India to Continue to Oppose EU's Move to Levy Carbon Tax*, LIVE MINT (Mar. 6, 2013, 12:40 AM), <http://www.livemint.com/Politics/jSPZ0xGBKZJTEWamRHiacL/India-to-continue-to-oppose-EUs-move-to-levy-carbon-tax.html>.

⁶⁹ Volcovici, *supra* note 3.

⁷⁰ Mayer, *supra* note 7, at 1114 (internal citations omitted).

⁷¹ Volcovici, *supra* note 3.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Alcock & Lowe, *supra* note 63.

nounced that the EU would temporarily suspend the application of the scheme to flights into and out of EU Member States on November 12, 2012.⁷⁵ Because the suspension only applies to flights into and out of EU Member States, it does not halt the application of the scheme to intra-EU flights, regardless of whether the flights are operated by EU or non-EU airlines.⁷⁶ While the international community welcomed the suspension of the scheme, the partial suspension upset EU airlines that feel the suspension now shoulders the administrative costs of the scheme on EU airlines.⁷⁷

The EU's suspension of the scheme is limited in duration, as the stated purpose of the suspension is to provide time for the ICAO General Assembly to negotiate a multilateral international deal that provides an alternative program to the scheme.⁷⁸ Accordingly, the EU committed to suspending the application of the scheme to flights into and out of EU Member States until the ICAO General Assembly meets from September 24 to October 4, 2013.⁷⁹ The EU climate change commissioner warned that if the ICAO fails to reach an international deal, then the full scheme will automatically be reinstated.⁸⁰

Although the fate of the scheme, as approved by the Court of Justice in *Air Transport*, is uncertain, the remainder of this article focuses on the legitimacy of the scheme and the *Air Transport* decision in light of select principles of customary international law.

V. THE JURISDICTIONAL OVERREACH OF THE COURT OF JUSTICE

A primary concern generated by the scheme and the Court's opinion in *Air Transport* is that the extraterritorial effects of the

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*; *Reducing Emissions from the Aviation Sector*, EUR. COMM'N, http://ec.europa.eu/clima/policies/transport/aviation/index_en.htm (last updated Oct. 31, 2013).

⁷⁹ Alcock & Lowe, *supra* note 63; *Assembly – 38th Session*, INT'L CIVIL AVIATION ORG., <http://www.icao.int/Meetings/a38/Pages/default.aspx> (last visited Oct. 2, 2013).

⁸⁰ Alcock & Lowe, *supra* note 63. The likelihood of the ICAO successfully coming up with an "international deal is unclear"; however, the European Commission on Climate Change is quick to point out that "[t]he EU has been seeking a global agreement to tackle aviation emissions through the [ICAO] for more than 15 years." *Reducing Emissions from the Aviation Sector*, *supra* note 78.

scheme on non-EU airlines are beyond the jurisdiction of the EU. This concern is well-founded, as a closer look at the effects doctrine demonstrates that the scheme and the Court of Justice's *carte blanche* approval of Directive 2008/101 violated the effects doctrine by allowing the EU to impermissibly regulate extraterritorial activities of non-EU airlines—regulation beyond the jurisdiction of the EU.

A. JURISDICTION, TERRITORIALITY, AND THE EFFECTS DOCTRINE

A central principle of customary international law is the sovereign equality of all nations.⁸¹ Accordingly, nations are endowed with jurisdictional authority within their territory and over their population.⁸² This has given rise to two discrete, independent bases of jurisdiction in international law: territoriality and nationality.⁸³ Because the nationality basis of jurisdiction generally addresses a nation's jurisdiction over its own nationals, nationality is not a relevant consideration in the context of Directive 2008/101 and *Air Transport*.⁸⁴ On the other hand, territoriality is especially relevant to Directive 2008/101.

The traditional concept of territoriality is “by far the most common basis for the exercise of jurisdiction . . . , and it has generally been free from controversy.”⁸⁵ Territoriality, or the “authority to make and enforce laws within [a nation's] territory,”⁸⁶ is coherently codified in the *Restatement (Third) of Foreign Relations Law of the United States (Restatement)* § 402:

[A] state has jurisdiction to prescribe law with respect to (1) (a) conduct that, wholly or in substantial part, takes place within its territory; (b) the status of persons, or interests in things, present within its territory; [and] (c) conduct outside its territory that has or is intended to have substantial effect within its territory.⁸⁷

A controversial development in the territorial principle of jurisdiction is the “effects doctrine,” a doctrine that was first intro-

⁸¹ Deborah Senz & Hilary Charlesworth, *Building Blocks: Australia's Response to Foreign Extraterritorial Legislation*, 2 MELB. J. INT'L L. 69, 79 (2001).

⁸² *Id.*

⁸³ *Id.*; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 cmt. b. (1987).

⁸⁴ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402.

⁸⁵ *Id.* § 402 cmt. c.

⁸⁶ Senz & Charlesworth, *supra* note 81, at 79.

⁸⁷ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1).

duced in the American landmark case of *United States v. Aluminum Co. of America* and generally permits limited extraterritorial jurisdiction in certain circumstances.⁸⁸ While "[t]he effects doctrine has been widely criticized,"⁸⁹ "the proper limits of jurisdiction over transnational activity have been analyzed by European courts and other authorities in much the same way as by those in the United States."⁹⁰ The effects doctrine is an aspect of territorial jurisdiction and can generally be defined as "jurisdiction with respect to activity outside the state, but having or intended to have substantial effect within the state's territory."⁹¹ The *Restatement* makes clear that to validly exercise jurisdiction under the effects doctrine, one must: (1) meet § 402(1)(c)'s requirement of an effect or intended effect that is substantial; and (2) demonstrate that "the exercise of jurisdiction is reasonable under § 403."⁹²

Restatement § 403 explains that jurisdiction over persons or activities having substantial effects or substantial intended effects cannot be exercised when it would be unreasonable to do so.⁹³ When deciding whether the exercise of jurisdiction would be reasonable, all relevant factors should be considered. The factors provided by § 403 can be distilled into three general factors: (1) the territorial/causal link of the activity to the regulating state; (2) the importance of the regulation to the regulating state; and (3) comity considerations (other nations' perceptions of the regulation and conflicts of laws with other nations).⁹⁴

In summary, to validly assert the effects doctrine as a basis for jurisdiction, one must fulfill a two-prong test by showing that: (1) the conduct has a substantial effect or intended effect on the regulating state; and (2) the exercise of jurisdiction by the regulating state is reasonable.⁹⁵

⁸⁸ *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 444 (2d Cir. 1945); Senz & Charlesworth, *supra* note 81, at 81.

⁸⁹ Senz & Charlesworth, *supra* note 81, at 81-82.

⁹⁰ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 *reps.* note 1.

⁹¹ *Id.* § 402 *cmt. d.*

⁹² *Id.*

⁹³ *Id.* § 403(1).

⁹⁴ *Id.* § 403(2)-(3) (listing the full, nonexclusive list of factors to be considered).

⁹⁵ *Id.* §§ 402-403.

B. DOES DIRECTIVE 2008/101, AS INTERPRETED IN *AIR TRANSPORT*, SATISFY THE EFFECTS DOCTRINE?

In *Air Transport*, the Court of Justice evaluated Directive 2008/101 in light of the three binding, applicable principles of customary international law referred to the Court by the U.K. court; importantly, this review was done under a manifest error standard of review.⁹⁶ Although all three principles relied upon in this case involve aspects of jurisdiction, the first “principle[,] that each State has complete and exclusive sovereignty over its airspace,” is especially rooted in the customary international law principle of the sovereign equality of all nations.⁹⁷ It is evident that the Court realized this and implicitly recognized that Directive 2008/101 involved jurisdictional issues throughout several parts of its evaluation of customary international law.⁹⁸ Therefore, in the author’s opinion, a more thorough discussion of jurisdiction, and in particular the effects doctrine, was warranted and should have been undertaken by the Court in *Air Transport*.

At this point, it is helpful to separate the scheme into two different regulations: (1) subjection of non-EU airlines to liability for emissions that occur within the territorial airspace of the EU (territorial emissions); and (2) subjection of non-EU airlines to liability for emissions that occur outside the territorial airspace of the EU (extraterritorial emissions).

The first prong of the effects doctrine, applied to the case at hand, requires one to ask whether the intended effect of the scheme (the reduction of carbon emissions) is substantial within EU territory.⁹⁹ While one could debate whether the actual effects of the scheme will have a substantial effect on the EU, there can be little doubt that the intended effect of subjecting non-EU airlines is substantial in the eyes of the EU. This is evidenced by the EU’s participation as a party to the Kyoto Protocol (among other environmental initiatives) and the

⁹⁶ Case C-366/10, *Air Transp. Ass’n of Am. v. Sec’y of State for Energy & Climate Change*, 2 C.L.M.R. 4, ¶¶ 110, 121–130 (2012).

⁹⁷ See *id.* ¶ 111; Mayer, *supra* note 7, at 1128.

⁹⁸ See *Air Transp. Ass’n of Am.*, 2 C.L.M.R. 4, ¶¶ 121–130. Examples of the Court considering jurisdictional issues include: its assessment involving the “territorial scope” of the Directive, its statement that the EU must respect international law in the exercise of its powers, its discussion of the unlimited jurisdiction of the EU when planes land at an airport in EU territory, and other considerations of territoriality. *Id.*

⁹⁹ See *id.*; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402.

establishment of the scheme in the first place.¹⁰⁰ However, having a generally intended substantial effect is not enough; there must be an intended substantial effect *within the territory of the EU*.¹⁰¹

This is an instance where the distinction between territorial and extraterritorial emissions becomes important. The intended substantial effects prong is clearly satisfied in terms of territorial emissions, as the EU intends to effectuate a substantial decrease of carbon emissions within its territorial airspace. This is not as clear when looking to extraterritorial emissions: by reducing extraterritorial emissions, is the EU intending to effectuate substantial effects within EU territory or within the global environment as a whole? In the author's opinion, the most logical answer is that the EU's regulation of extraterritorial emissions is intended to effectuate substantial effects on the global climate, but not substantial effects within EU territory. However, because the Court was reviewing Directive 2008/101 under a manifest error standard of review¹⁰² and because the EU holds itself out as an aggressive protector of the environment,¹⁰³ this prong of the effects doctrine could reasonably be held to have been satisfied in *Air Transport* as to both types of emissions; but under a less deferential standard of review, this would not be the case.¹⁰⁴

The fatal prong of the effects doctrine for the scope of Directive 2008/101 is the second prong: the exercise of jurisdiction by the state must be reasonable.¹⁰⁵ The EU's exercise of jurisdiction over emissions that occur outside EU territory is manifest error because it unreasonably purports to regulate highly indirect, extraterritorial conduct that is not sufficiently territorially

¹⁰⁰ See, e.g., Kyoto Protocol, *supra* note 12; *Air Transp. Ass'n of Am.*, 2 C.L.M.R. 4, ¶¶ 26–40.

¹⁰¹ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402.

¹⁰² *Air Transp. Ass'n of Am.*, 2 C.L.M.R. 4, ¶ 110.

¹⁰³ See, e.g., *id.* ¶ 128 (stating that “European Union policy on the environment seeks to ensure a high level of protection”).

¹⁰⁴ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402. Again, the first prong allows the intentions of the regulating party to stand in for the actual effects of such exercise of jurisdiction; combining the aggressive intentions of the EU relating to environmental protection and the highly deferential standard of review, one would be hard-pressed to say Directive 2008/101's regulation of extraterritorial emissions violated this prong. See *id.*

¹⁰⁵ *Id.* § 403.

linked to the EU. Such a conclusion is reached by analyzing the various factors provided by *Restatement* § 403.¹⁰⁶

The first general factor to consider in analyzing the reasonableness of Directive 2008/101 is whether there is a sufficient territorial linkage to subject non-EU airlines to the scheme; in other words, this analysis must consider “the extent to which the activity takes place within the territory, or has substantial, *direct*, and foreseeable effect upon or in the territory.”¹⁰⁷ By the express language of this factor, the territorial emissions have sufficient territorial linkage because the emissions take place within EU territory.¹⁰⁸ But this is not the case for extraterritorial emissions. Sufficient territorial linkage would require the extraterritorial emissions to have a *direct* effect upon the territory of the EU.¹⁰⁹ Here, however, the effects of extraterritorial emissions are indirect, at best. For example, emissions occurring while a plane is flying over New York will affect the quality of the air in and around New York. The potential indirect effect such emissions will have upon the EU requires a long chain of speculative events: the carbon emissions gather over the New York area, which causes a small, local increase in temperature, which causes a minute increase in temperatures worldwide (over an extended period of time) by way of a slow dispersement of heat throughout the world. The effects such emissions have on the EU are the same effects they have on China or Canada: highly indirect.

In addition, the territorial linkage stemming from non-EU planes landing in the EU, which the Court claims is sufficient territorial linkage,¹¹⁰ is only sufficient for territorial emissions. Non-EU planes that land in the EU must fly a portion of their route over EU airspace, which provides a direct territorial linkage. However, before a plane enters EU airspace, its emissions are not directly affecting the EU and cannot be justified by the mere fact that the plane eventually lands in the EU. Therefore, the extraterritorial emissions do not have a sufficient link to the EU to fulfill the territorial linkage factor of the reasonableness prong. The territorial emissions do, however, have a sufficient territorial link.

¹⁰⁶ See *id.* § 403(2)–(3).

¹⁰⁷ See *id.* § 403(2)(a) (emphasis added).

¹⁰⁸ See *id.*

¹⁰⁹ See *id.*

¹¹⁰ See Case C-366/10, *Air Transp. Ass’n of Am. v. Sec’y of State for Energy & Climate Change*, 2 C.L.M.R. 4, ¶ 125 (2012).

The second general factor to consider in analyzing the reasonableness of Directive 2008/101 is the importance of the scheme to the EU.¹¹¹ As discussed earlier, the EU places a high priority on environmental protection, which is evidenced by agreements to which the EU is a party, such as the Kyoto Protocol,¹¹² and by simply looking to various statements by the Court in *Air Transport*.¹¹³ In fact, "the EU has often taken the lead in global efforts to mitigate climate change."¹¹⁴ Therefore, this second factor weighs in favor of the scheme as to both territorial and extraterritorial emissions.

The third general factor to consider in analyzing the reasonableness of Directive 2008/101 is a broad concern of comity that looks to both other nations' perceptions of the scheme and the potential for conflict of laws.¹¹⁵ As evidenced in Part IV, this factor swings very heavily against the scheme.¹¹⁶ The governments of at least twenty-eight countries protested the inclusion of non-EU aircraft in the scheme.¹¹⁷ Many countries threatened retaliatory measures, and some non-EU airlines have refused to comply with procedures required under the scheme.¹¹⁸ Additionally, the United States has even passed bills in the House of Representatives and Senate that shield U.S. airlines from complying with the scheme, setting up a stark conflict of laws between the United States and the EU.¹¹⁹

Two of the three general reasonableness factors under *Restatement* § 403 weigh very heavily in favor of finding the scheme unreasonable. However, the territorial link factor only weighs against the reasonableness of the extraterritorial emissions. Therefore, in *Air Transport*, the Court should have invalidated the scheme under the effects doctrine as to extraterritorial emissions as unreasonable, but should have validated the scheme as to territorial emissions as reasonable. In other words, the Court of Justice should have limited the scope of Directive 2008/101

¹¹¹ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(2)(c), (e).

¹¹² See Kyoto Protocol, *supra* note 12.

¹¹³ *Air Transp. Ass'n of Am.*, 2 C.L.M.R. 4, ¶ 128 ("[EU] policy on the environment seeks to ensure a high level of protection.").

¹¹⁴ Mayer, *supra* note 7, at 1115.

¹¹⁵ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(2)(c), (e)–(h), (3).

¹¹⁶ See *supra* Part IV.

¹¹⁷ Mayer, *supra* note 7, at 1113–14.

¹¹⁸ *Id.*; Volcovici, *supra* note 3.

¹¹⁹ Volcovici, *supra* note 3.

to subjecting non-EU aircraft to liability under the scheme only for territorial emissions—not extraterritorial emissions. A proposed formula for calculating this is contained in Appendix A.

VI. CONCLUSION

As evidenced by the Chicago Convention, the Kyoto Protocol, the Open Skies Agreement, the EU's carbon emissions trading scheme, and Directive 2008/101, the EU considers the reduction of greenhouse gases a priority—regulating carbon emissions by the airline industry plays a large role in that reduction. But no matter how important reducing carbon emissions is to the EU, that interest does not confer the right to impose regulations that surpass the limits of the EU's jurisdiction. *Air Transport* put the EU's controversial inclusion of extraterritorial emissions emitted by EU and non-EU airlines alike in its carbon emissions trading scheme in the hands of the Court. Unfortunately, the Court failed to appropriately analyze whether the subjection of non-EU aircraft to liability for extraterritorial emissions satisfies jurisdictional customary international law.

The intensity of the scheme should have been limited to the legitimate reach of EU jurisdiction. A thorough analysis of Directive 2008/101 in light of the effects doctrine shows that Directive 2008/101, as interpreted in *Air Transport*, is overly broad and excessive in its extraterritorial effects. While the Court's judgment in *Air Transport* is not wholly incorrect, a more appropriate judgment from the Court would have limited the scope of non-EU airline liability to emissions that occurred within the territorial airspace of the EU.¹²⁰

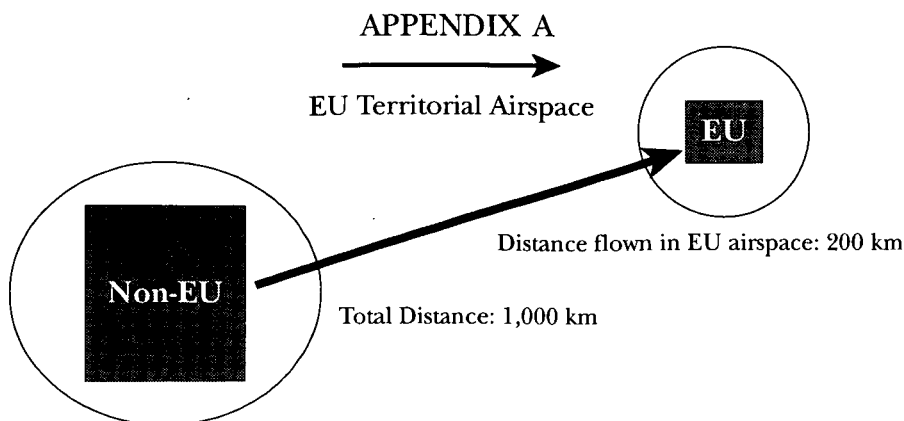
The international reaction to Directive 2008/101 and the Court's *Air Transport* decision has been general uproar and disdain for such a unilateral imposition of a carbon emissions trading scheme upon non-EU airlines. The backlash was so intense that some anticipated a possible trade war between the EU and many of the world's economic powers, including the United States, Russia, Japan, China, and India.¹²¹ The ICAO opposed Directive 2008/101, and the United States even passed a bipartisan law prohibiting U.S. airlines from complying with the EU's carbon emissions trading scheme.

Wisely, the EU suspended the application of the scheme to flights into and out of the EU until the ICAO has a chance to

¹²⁰ See *infra* Appendix A.

¹²¹ Alcock & Lowe, *supra* note 63.

negotiate an international, multilateral deal that provides an alternative to the EU's current carbon emissions trading scheme. Because the suspension will be lifted if the ICAO fails to negotiate a viable alternative, the pressure is now on the ICAO to reach a multilateral agreement. If such an agreement is reached and replaces Directive 2008/101, the Court's problematic decision in *Air Transport* will be neutralized. But if the ICAO fails to reach such an agreement, the *Air Transport* decision will—in the EU's eyes—continue to authorize its application of the scheme to all emissions occurring during the entirety of any flight that lands in or departs from an EU Member State.



Current Emission Formula (for one-way flight):

- Emission quantity = fuel consumption x emissions factor
 - Where “fuel consumption” = amount of fuel contained in aircraft tanks once fuel uplift for the flight is complete – amount of fuel contained in aircraft tanks once fuel uplift for subsequent flight is complete.

Proposed Emission Formula (for one-way flight):

- Emission quantity = fuel consumption x emissions factor
 - Where “fuel consumption” = (amount of fuel contained in aircraft tanks once fuel uplift for the flight is complete – amount of fuel contained in aircraft tanks once fuel uplift for subsequent flight is complete) x proportion of flight occurring in EU territorial airspace.
 - Where “proportion of flight occurring in EU territorial airspace” = distance flown in EU territorial airspace ÷ total distance of flight.

Example calculation of “proportion of flight occurring in EU territorial airspace” value, based on above diagram:

- $200 \text{ km} \div 1,000 \text{ km} = 0.2$

